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In the Supreme Court of the United States

OCTOBER TERM, 1983

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

FRANK KUEHNER, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether, in the absence of exhaustion of administrative remedies, the district court had jurisdiction under 42 U.S.C. (Supp. V) 405(g), 28 U.S.C. (Supp. V) 1331, or 28 U.S.C. 1361 over this action challenging the standards and procedures applied by the Secretary of Health and Human Services and state officials to determine whether an individual continues to be eligible for disability benefits under Title II or Title XVI of the Social Security Act.

PARTIES TO THE PROCEEDING

The petitioners are Margaret M. Heckler, Secretary of Health and Human Services; Martha A. McSteen, Acting Commissioner of Social Security; Barry Stern, Secretary of the Pennsylvania Department of Labor and Industry; and John Delpaine, Director of the Pennsylvania Disability Determination Bureau.

The named respondents are Frank Kuehner, Dorothy Burayak, Richard Burns, Alice Hetherington, Frank Jennings, Jr., Philip Fisher, Clinton Royal, Solomon Katz, Raymond Staniewicz, James N. McKeown, James Loughlin, Margaret Douglas, Lawrence Cook, Steven Sverdlow, Elaine Fleigelman, and Riva Yanovskaya. The named respondents are representatives of a class consisting of "all Pennsylvania Social Security Disability Insurance and Supplemental Security Income disability beneficiaries whose benefits have been terminated or are threatened with termination and who have presented claims for continued disability" (C.A. App. 40).

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the Secretary of Health and Human Services, the Commissioner of Social Security, the Secretary of the Pennsylvania Department of Labor and Industry, and the Director of the Pennsylvania Disability Determination Bureau, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-34a) is reported at 717 F.2d 813. The opinion of the district court (App., *infra*, 39a-45a) is reported at 547 F. Supp. 49.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 35a-36a) was entered on September 19, 1983, and a petition for rehearing was denied on November 28, 1983 (App., *infra*, 37a-38a). On February 21, 1984, Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including March 27, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

28 U.S.C. (Supp. V) 1331, 28 U.S.C. 1361, relevant provisions of the Social Security Act, and 20 C.F.R. 416.903 are reproduced at App., *infra*, 46a-56a.

STATEMENT

A. The Statutory and Regulatory Framework

Titles II and XVI of the Social Security Act provide for the payment of disability benefits to a person who, because of a physical or mental impairment that has lasted or can be expected to last for a continuous period of not less than 12 months, is unable to do his previous work or to "engage in any * * * kind of substantial gainful work which exists in the national economy." 42 U.S.C. 423(d)(2)(A), 1382c(a)(3)(B). An individual who is found to be disabled thereafter may continue to receive benefits only for as long as his status—medical and otherwise—continues to satisfy the statutory definition of disability. 42 U.S.C. (& Supp. V) 423(a)(1), 425; 20 C.F.R. 404.1594, 404.1597. Accordingly, Congress has provided for the Secretary, at least once every three years, to review the cases of individuals who previously were found to be disabled under Title II in

order to ascertain whether they continue to be eligible for benefits. 42 U.S.C. (Supp. V) 421(h). The Secretary has provided for a parallel program of periodic review under the Title XVI Supplemental Security Income (SSI) program. When the individual's case is reviewed, he bears the burden of showing that he continues to have a physical or mental impairment of sufficient severity to satisfy the statutory standard of disability. *Mathews* v. *Eldridge*, 424 U.S. 319, 336 (1976).

The initial determination whether a person receiving benefits is still disabled ordinarily is made by a state agency, pursuant to regulations, guidelines, and performance standards established by the Secretary. 42 U.S.C. (& Supp. V) 421(a), 1383b(a); 20 C.F.R. 404.1503, 416.903. The state agency first notifies the individual that his case has been selected for review and inquires about his current medical condition and the identity of his treating physician or medical facility. 20 C.F.R. 404.1593, 416.993. If the state agency then makes a tentative determination that the disability has ceased, the individual is given an advance written notice and explanation and is informed that he has 10 days within which to submit any additional information. 20 C.F.R. 404.1594-404.1595, 416.994. After this 10-day period and the receipt of any further evidence, the state agency makes its initial determination. See *Mathews* v. *Eldridge*, 424 U.S. at 337-338. Some state agency determinations in turn are subject to review by the Social Security Administration (SSA) prior to their effectuation, in order to ensure the quality and uniformity of state decisions and compliance with governing procedures. See 42 U.S.C. (Supp. V) 421(c).

If an individual receiving disability benefits under Title XVI of the Act is dissatisfied with the initial determination, the next step in the administrative process is the statutorily mandated opportunity for an evidentiary hearing before an administrative law judge (ALJ) in SSA. 42 U.S.C. (Supp. V) 1383(c)(1); 20 C.F.R. 416.1407, 416.1429-416.1465. Because entitlement to SSI benefits, unlike Title II benefits, is based on need (42 U.S.C. 1382(a)), the Secretary has implemented this Court's decision in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), by providing that the actual payment of benefits will not be terminated until after the ALJ has rendered his decision following the hearing. 20 C.F.R. 416.1336(b).

If an individual receiving disability benefits under Title II is dissatisfied with the initial determination, he must request reconsideration of that determination before obtaining an ALJ hearing. 20 C.F.R. 404.907-404.921. Under amendments to the Act effective on January 1, 1984, the individual must be afforded an opportunity for a face-to-face evidentiary hearing at this reconsideration stage. Pub. L. No. 97-455, § 4, 96 Stat. 2499, to be codified at 42 U.S.C. 405(b)(2). If the decision on reconsideration is adverse to the claimant, he then is entitled to an ALJ hearing. 42 U.S.C. (Supp. V) 421(d), 405(b); 20 C.F.R. 404.944-404.965. Congress enacted temporary legislation in 1982 permitting the claimant in a Title II disability cessation case to elect to receive interim benefits pending receipt of the ALJ's decision, subject to recoupment if the determination that his disability ceased is affirmed.[1]

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[1] Pub. L. No. 97-455, § 2, 96 Stat. 2498, to be codified at 42 U.S.C. 423(g). The temporary authorization (as briefly extend-

If the decision by the ALJ after a hearing is adverse, the Title II or Title XVI claimant may seek review by the Appeals Council in SSA. 20 C.F.R. 404.967-404.983, 416.1467-416.1483. In addition, in Section 304(g) of the Social Security Disability Amendments of 1980 (94 Stat. 456), Congress directed the Secretary to institute a program for the Appeals Council to review some ALJ decisions on its own motion, in order to ensure accuracy and uniformity among ALJ decisions. Only after the Appeals Council has either denied review of the ALJ's decision or has granted review and rendered a decision is the Secretary deemed to have rendered her "final decision" or "final determination" on the claim, which is then subject to judicial review in federal district court pursuant to 42 U.S.C. (Supp. V) 405(g). See 42 U.S.C. (& Supp. V) 421(d), 1383(c)(3); 20 C.F.R. 404.900(a)(5), 404.981, 416.1400(a)(5), 416.1481.

B. The Proceedings In This Case

1. This class action was filed in the United States District Court for the Eastern District of Pennsylvania on April 29, 1982 against the Secretary of Health and Human Services and the Commissioner of Social Security, as well as the state officials responsible for administering the Social Security disability programs in Pennsylvania on the Secretary's behalf (C.A. App. 4).[2] The

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ed by Pub. L. No. 98-118, § 2, 97 Stat. 803) applies to any case in which the initial determination that the disability had ceased was made on or after (or was pending on administrative review on) the effective date of the Act (January 12, 1983), but before December 7, 1983. HHS may continue to pay benefits in such cases through June 1984 or until the ALJ renders his decision, whichever occurs first.

[2] "C.A. App." refers to the Appendix filed in the court of appeals.

plaintiffs alleged in their amended complaint (C.A. App. 1-29) filed on June 25, 1982 that the standards and procedures utilized by the defendants for determining whether an individual's disability has ceased violate the Social Security Act and the Due Process Clause of the Constitution. Specifically, the plaintiffs alleged as such violations: (1) that the defendants fail to show, as a condition to terminating benefits, that the claimant's medical condition has improved; (2) that the defendants fail to give presumptive effect to the prior determination of disability when they review a claimant's continuing eligibility; (3) that the defendants terminate benefits in the absence of fully developed medical evidence from all treating medical personnel and without giving appropriate weight to such evidence; and (4) that the defendants terminate benefits "without observing the sequential disability evaluation process by considering such factors as medical equivalence, combination of impairments, pain, and residual functional capacity" (C.A. App. 25-26; App., *infra*, 39a-40a). Jurisdiction was alleged to rest on 42 U.S.C. (Supp. V) 405(g), 42 U.S.C. 1383(c)(3), 28 U.S.C. (Supp. V) 1331, and 28 U.S.C. 1361 insofar as the case was brought against the federal defendants, and on 28 U.S.C. (Supp. V) 1343 and pendent jurisdiction as against the state defendants (C.A. App. 3).

The district court certified a class of plaintiffs consisting of all disability beneficiaries under Title II and Title XVI of the Act in Pennsylvania "whose benefits have been terminated or are threatened with termination and who have presented claims for continued disability" (C.A. App. 40). The complaint alleged that there were 102,676 SSI disability beneficiaries and 158,565 Title II disability beneficiaries in Pennsylvania as of January

1982 whose cases were (or soon would be) subject to review and who therefore were potential class members (C.A. App. 5). There was no allegation, however, that these unnamed class members actually had received an initial determination that their disabilities had ceased or that they had exhausted their administrative remedies by seeking reconsideration, an ALJ hearing, and Appeals Council review. Moreover, none of the named plaintiffs who are still active members of the class had exhausted his administrative remedies, and in many instances the named plaintiffs had not even completed the reconsideration stage.[3]

2. The district court dismissed the complaint for lack of subject matter jurisdiction. The court first held that jurisdiction did not lie under 42 U.S.C. (Supp. V) 405(g)

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[3] See C.A. App. 7-22, ¶¶ 22, 28, 35, 42, 46, 51, 69, 74, 80, 82, 94, 98, 104, 112, 115. An affidavit of an SSA official, which was based upon SSA's search of the individual claimants' records and was included in a Supplemental Appendix filed in the court of appeals (Supp. C.A. App.), confirmed that these named plaintiffs had not exhausted their administrative remedies, although the files of several named plaintiffs could not be located (see Supp. C.A. App. 6 ¶ 10, 9 ¶ 16). One of the original named plaintiffs, Clinton Royal, had exhausted his administrative remedies and had sought judicial review in an individual action under 42 U.S.C. (Supp. V) 405(g) in the United States District Court for the Eastern District of Pennsylvania (No. 81-4747) before this class action was filed (C.A. App. 14 ¶ 59). Final judgment in Royal's individual action was entered in favor of the Secretary on March 31, 1983, and no appeal was taken from that judgment. The decision terminating his benefits therefore became final and binding upon him. 42 U.S.C. 405(h). Although Royal was a named party in the court of appeals in this class action as well and therefore is a named respondent before this Court, he cannot be considered still to be an active member of the respondent class, much less a suitable class representative.

because the plaintiffs had failed to exhaust "their available and adequate administrative remedies" (App., *infra*, 40a). The court explained that under this Court's decision in *Weinberger* v. *Salfi*, 422 U.S. 749, 765-777 (1975), the "final decision" requirement is central to the grant of subject matter jurisdiction under 42 U.S.C. (Supp. V) 405(g) and that the Secretary must determine what constitutes a "final decision" for these purposes. Here, the court noted, the Secretary had declined to waive the exhaustion requirement because respondents' claims raised both factual and legal issues for which further administrative review would be appropriate. App., *infra*, 40a-41a.

The district court also concluded that it could not excuse exhaustion and find jurisdiction under 42 U.S.C. (Supp. V) 405(g) on the theory that the issues respondents sought to raise are "collateral" to their substantive claims for benefits within the meaning of the exception to the exhaustion requirement recognized in *Mathews* v. *Eldridge*, 424 U.S. at 330-332. In the court's view, respondents' statutory contentions "consist of a grievance respecting the benefits due" and are "directed at upsetting the merits of the Secretary's determination," and their constitutional claims are "inextricably intertwined" with these statutory contentions (App., *infra*, 43a).

The district court concluded that other bases of jurisdiction were foreclosed as well. It explained that the special statutory procedure for judicial review under 42 U.S.C. (Supp. V) 405(g) is "exclusive and cannot be circumvented by resort to the general jurisdiction of the district courts" under 28 U.S.C. (Supp. V) 1331 to entertain actions "seeking broad injunctive and declaratory relief" (App., *infra*, 44a). The "extraordinary" rem-

edy of mandamus under 28 U.S.C. 1361 also was not available, the court concluded, because respondents "have other ample and available means by which to have their claims reviewed, such as the administrative procedures of an Administrative Law Judge hearing and an Appeals Council review, and such as judicial review pursuant to [42 U.S.C. (Supp. V)] 405(g) with the benefit of an administrative record" (App., *infra*, 44a-45a). Finally, the court held that it did not have jurisdiction under 28 U.S.C. (Supp. V) 1343 insofar as respondents sought relief against the state defendants, because those defendants' actions in administering the Social Security Act are taken "under color of federal law as mere agents of the Secretary," not under color of state law (App., *infra*, 45a).

3. The court of appeals reversed the district court's dismissal of the case for lack of jurisdiction and remanded for further proceedings (App., *infra*, 1a-34a). The court held that despite respondents' conceded failure to exhaust their administrative remedies, the district court had jurisdiction under 42 U.S.C. (Supp. V) 405(g) insofar as the action was brought against the Secretary and Commissioner of Social Security. Citing *Weinberger* v. *Salfi*, the court was of the view that "[t]here is no § 405(g) exhaustion requirement for constitutional issues" (App., *infra*, 8a-9a). Moreover, the court concluded that immediate judicial review is available under 42 U.S.C. (Supp. V) 405(g) to consider a statutory issue, even though the claimant has not exhausted his administrative remedies with respect to his claim for benefits, if the Secretary has taken a " 'final position' " on the particular issue (App., *infra*, 8a-9a, quoting *Liberty Alliance of the Blind* v. *Califano*, 568 F.2d 333, 345-346 (3d Cir. 1977)).

Here, the court of appeals observed, respondents presented both constitutional and statutory issues with respect to which the Secretary allegedly had taken "fixed" or "final" positions (App., *infra*, 9a). The court concluded that the latter allegation must be accepted as true for purposes of a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) for lack of jurisdiction and that respondents must be afforded an opportunity to prove at trial that the Secretary in fact has taken such "fixed" positions (App., *infra*, 9a-10a). In addition, the court held that the district court had mandamus jurisdiction under 28 U.S.C. 1361 to order class-wide relief against the federal defendants, notwithstanding the preclusion of review in 42 U.S.C. 405(h) (App., *infra*, 11a-12a).

Finally, the court of appeals found jurisdiction under 28 U.S.C. (Supp. V) 1331 insofar as the action was brought against the state defendants, even though respondents had alleged such jurisdiction only under 28 U.S.C. (Supp. V) 1343 (App., *infra*, 5a-7a). The court acknowledged this Court's holding in *Weinberger* v. *Salfi* that 42 U.S.C. 405(h) bars the exercise of jurisdiction under 28 U.S.C. (Supp. V) 1331, but it concluded that *Salfi* is "not controlling" here (App., *infra*, 6a). The court reasoned that 42 U.S.C. 405(h) refers only to actions "against the United States, the Secretary, or any officer or employee thereof," and therefore is not a limitation of jurisdiction over a suit against state officials in connection with the adjudication of claims arising under the Social Security Act (App., *infra*, 6a).[4]

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[4] Judge Becker issued a separate concurring opinion (App., *infra*, 14a-34a). Judge Becker concluded that jurisdiction over the action against the state defendants under 28 U.S.C. (Supp. V) 1331 was barred by 42 U.S.C. 405(h) because they are mere agents or alter egos of the Secretary in administering the Social Security disability programs (App., *infra*, 14a-16a), but he found that the district court could exercise mandamus jurisdiction against the state defendants under 28 U.S.C. 1361 (App.,

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals is flatly inconsistent with this Court's decisions in *Weinberger* v. *Salfi*, 422 U.S. 749 (1975), and subsequent cases and squarely conflicts with the Second Circuit's jurisdictional rulings in an essentially identical case. *Smith* v. *Schweiker*, 709 F.2d 777 (1983). The court of appeals' wholesale abandonment of the statutory exhaustion requirement in this class action involving potentially scores of thousands of individuals whose claims for benefits are still pending on administrative review threatens substantially to disrupt the orderly administrative and judicial review of claims for benefits under the massive Social Security disability programs. See also *Heckler* v. *Lopez*, No. 83-6126 (9th Cir. Feb. 22, 1984), application for stay pending, No. A-707.[5] Review therefore is plainly warranted.

The Court heard argument on February 27, 1984 in *Heckler* v. *Ringer*, No. 82-1772, which arises under the

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infra, 27a-34a). Judge Becker agreed with the majority that the district court had jurisdiction over the action against the federal defendants under 42 U.S.C. (Supp. V) 405(g) in the particular circumstances of this case (App., *infra*, 16a-27a), despite what he characterized as the Secretary's "forceful arguments" that respondents' contentions "are inextricably intertwined with the merits of each disability-benefits termination decision" and thus are not collateral to their claims for benefits (*id.* at 22a-23a (footnote omitted)).

[5] See also *Mental Health Ass'n of Minnesota* v. *Heckler*, 720 F.2d 965 (8th Cir. 1983); *City of New York* v. *Heckler*, Civ. No. CV-83-0457 (E.D.N.Y. Jan. 1, 1984), appeal pending, No. 84-6037 (2d Cir.); *Trujillo* v. *Heckler*, Civil No. 82-k-1505 (D. Colo. Dec. 15, 1983), appeal pending, Nos. 83-2413 & 84-1181 (10th Cir.); *Hyatt* v *Heckler*, No. C-C-83-655-17 (W.D.N.C. Feb. 14, 1984); *Doc* v. *Heckler*, Civ. No. M-83-2218 (D. Md. Dec. 13, 1983), appeal pending, No. 84-1202 (4th Cir.); *Graham* v. *Heckler*, 573 F. Supp. 1573 (N.D. W. Va. 1983).

Medicare title of the Social Security Act but which presents closely related questions of jurisdiction and exhaustion of administrative remedies. The Court therefore may wish to hold the petition in this case and dispose of it in light of the decision in *Ringer*. We will address here several additional matters pertaining to the disability programs and the decision below that are not directly raised in *Ringer*.

1. Immediately after 42 U.S.C. 405 was enacted in 1939, the Social Security Board promulgated regulations making clear that judicial review could be obtained under 42 U.S.C. 405(g) only after the Appeals Council had either denied review or granted review and rendered its decision. 5 Fed. Reg. 4169, 4171-4174 (1940) (adopting 20 C.F.R. 403.706(c), 403.708(g), 403.709(*l*) and 403.710(e)). See Gov't Reply Br. 5-6, *Heckler* v. *Ringer*, No. 82-1772. Those requirements remained in effect when Congress established the disability program under Title II in 1954 and 1956[6] and the SSI program under Title XVI in 1972.[7] Against the background of this longstanding administrative implementation of Section 405, Congress's explicit specification in Title II and Title XVI that judicial review of the Secretary's "final decision" or "final determination" on a claim for disability benefits would be available in the manner "provided in section 405(g)" (42 U.S.C. 421(d), 1383(c)(3)) constitutes a congressional ratification of the exhaustion requirement in the then-existing regulations

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[6] Social Security Amendments of 1954, ch. 1206, § 106, 68 Stat. 1079; Social Security Amendments of 1956, ch. 836, § 103, 70 Stat. 815. See 20 C.F.R. 403.706(c), 403.708(g), 403.709(*l*) and 403.710(e) (1954 & 1956).

[7] Social Security Amendments of 1972, Pub. L. No. 92-603, Tit. III, 86 Stat. 1465 *et seq*. See 20 C.F.R. 404.908, 404.916, 404.940, 404.951 (1972).

and an expression of congressional intent that the same prerequisite to judicial review apply under the SSI and Title II disability programs. See *Haig* v. *Agee*, 453 U.S. 280, 297-299 (1981); *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978).

In addition, from 1975 to the present day, Congress repeatedly has examined the four-stage process for administrative review of disability claims (see Gov't Br. 3-6, 23-31, *Heckler* v. *Day*, No. 82-1371 (argued Dec. 5, 1983)) without altering the exhaustion requirements in the Secretary's regulations. *Bob Jones University* v. *United States*, No. 81-3 (May 24, 1983), slip op. 25. Significantly, moreover, Congress's intensive concern with these matters has been concentrated in the years following this Court's decision in *Salfi*, which held that a court may not excuse the exhaustion of administrative remedies required by the Secretary's regulations based on its own finding of futility (422 U.S.C. at 764-767), and also following this Court's decision in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), which reaffirmed the *Salfi* holding in the specific context of the termination of disability benefits and recognized only a narrow exception to the exhaustion requirement for an "entirely collateral" issue that otherwise would be effectively unreviewable and unremediable (424 U.S. at 330-332). Although Congress has amended the procedures for review of disability claims under Title II and Title XVI in a number of other respects, it has not chosen to alter the exhaustion and jurisdictional rules established by *Salfi* and *Eldridge*.

For example, as a result of its continuing review, Congress extensively revised the disability programs in 1980 and 1982 to require such measures as: extensive

regulation by the Secretary of the States' processing of claims for benefits, periodic continuing disability reviews under Title II, a more complete explanation of an initial denial of benefits by a state agency,[8] mandatory review by SSA of determinations by state agencies, an opportunity for a face-to-face evidentiary hearing at the reconsideration stage of Title II disability cessation cases, temporary authorization for the payment of interim benefits in Title II disability cessation cases pending the ALJ's decision, review of some ALJ decisions by the Appeals Council on its own motion to ensure adequate and uniform adjudication, and limitations on the remand of cases pending on judicial review under 42 U.S.C. 405(g).[9] See pages 2-5, *supra*. It is simply inconceivable that Congress intended that the multi-stage process for the administrative and judicial review of disability claims that these measures were designed to strengthen could be circumvented in the manner countenanced by the court of appeals in this case. Indeed, the text of the amendments demonstrates that Congress intended no such departure.

The statutory revisions in the disability programs discussed above specifically included amendments to 42 U.S.C. 405(b) and 1383(c)(1), which establish the ALJ hearing as an essential step in the review of claims for benefits; an amendment to 42 U.S.C. 405(g), which permits judicial review only of the Secretary's final decision after that hearing; and an amendment to 42 U.S.C.

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[8] See the second sentence of 42 U.S.C. (Supp. V) 405(b) and 1383(c)(1).

[9] 42 U.S.C. (Supp. V) 405(g), as amended by Section 307 of the Social Security Disability Amendments of 1980, Pub. L. No. 96-265, 94 Stat. 458.

421(d), which provides for administrative hearings on Title II disability claims to be conducted pursuant to 42 U.S.C. 405(b) and for judicial review to be available pursuant to 42 U.S.C. 405(g).[10] Congress's amendment of the controlling statutory sections in other respects—while leaving untouched those portions that on their face and as construed by this Court require full exhaustion of administrative remedies as a prerequisite to judicial review under 42 U.S.C. 405(g)—manifests an intent to retain the latter requirements. See, *e.g.*, *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 378-379 (1982).[11]

2. The particular rationale of the court below for excusing exhaustion of administrative remedies as a prerequisite to jurisdiction under 42 U.S.C. (Supp. V) 405(g) warrants only a brief response. The court first held, citing *Weinberger* v. *Salfi*, that "[t]here is no

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[10] See Sections 304(d), 305 and 307 of the Social Security Disability Amendments of 1980, Pub. L. No. 96-265, 94 Stat. 456, 457 and 458; Pub. L. No. 97-455, § 4, 96 Stat. 2499, to be codified at 42 U.S.C. 405(b)(2).

[11] Moreover, under the SSI program, an individual's disability benefits are not terminated until after he has had an ALJ hearing and the ALJ renders a decision that his disability has ceased. See page 4, *supra*. All that remains at that point is the requirement that the claimant seek review by the Appeals Council prior to filing an action under 42 U.S.C. (Supp. V) 405(g). This would not ordinarily be a time-consuming step. There is no permanent authorization under Title II for the payment of interim benefits pending the ALJ's decision. But Congress in the past has enacted temporary legislation providing for the payment of such benefits (see page 4, *supra*), and in doing so has demonstrated how it believes any problems resulting from delay in exhaustion of administrative remedies should be addressed. Congress has not authorized a circumvention of these remedies, as the court of appeals has done.

§ 405(g) exhaustion requirement for constitutional issues" (App., *infra*, 8a-9a). But *Salfi* in fact stands for the opposite proposition: the Court there explicitly held that the district court could *not* dispense with the exhaustion requirement on the ground of futility simply because the plaintiff raised a constitutional challenge to a provision of the Social Security Act. 422 U.S. at 766-767. Contrary to the apparent view of the court of appeals (App., *infra*, 8a), the Court did not retreat from this holding in *Mathews* v. *Eldridge*. The Court in *Eldridge* simply permitted interlocutory judicial review on an issue that was "entirely collateral" to the substantive claim for benefits and that could not be adequately reviewed and remedied in subsequent proceedings. 424 U.S. at 330-332. By contrast, respondents' evidentiary contentions in this case are not even remotely "collateral" to their substantive claims for benefits; those contentions can be adequately considered on judicial review of the Secretary's "final decision" disposing of the entire claim for benefits; and any error can be adequately remedied by means of a retroactive award of benefits. See *Heckler* v. *Lopez*, No. A-145 (Sept. 9, 1983) (Rehnquist, Circuit Justice), slip op. 9; *Smith* v. *Schweiker*, 709 F.2d 777, 780-781 (2d Cir. 1983).

Equally without merit is the court of appeals' conclusion that a claimant may obtain interlocutory judicial review on a statutory issue if the Secretary has taken a "final position" on that particular issue (App., *infra*, 8a-9a). The authorization for review of a "final decision" in 42 U.S.C. (Supp. V) 405(g), like that in 28 U.S.C. 1291, permits review only of a final judgment terminating the litigation, except in the narrow category of otherwise unreviewable "collateral" issues.

Mathews v. *Eldridge*, 424 U.S. at 330-332. See Gov't Reply Br. at 3-5, 9-16, *Heckler* v. *Ringer*. What is more, the court of appeals held that respondents' allegations that the Secretary had taken "fixed" positions on the issues they sought to litigate must be accepted as true for purposes of ruling on the Secretary's motion to dismiss for lack of jurisdiction (App., *infra*, 3a-9a, 10a). The court therefore apparently contemplates a trial on remand not only on the merits of the "issues" involved, but also on the threshold question of whether the Secretary harbors "fixed" views on them. This approach is totally at odds with the statutory exhaustion requirement. When the Secretary ultimately renders her "final decision" on a claim for benefits, that decision necessarily will embody her final position, as applied to the individual claim, on any issue that plays a role in her disposition of the claim. Her decision then will be supported by an administrative record adequate for purposes of judicial review. Only in that concrete setting may a court review the Secretary's "position" on a particular "issue."

3. The court of appeals also plainly erred in finding jurisdiction over the action against the state officials under 28 U.S.C. (Supp. V) 1331, despite the bar in the third sentence of 42 U.S.C. 405(h) to the exercise of jurisdiction under Section 1331 (App., *infra*, 5a-7a). Although the third sentence of Section 405(h) in terms refers only to actions "against the United States, the Secretary, or any officer or employee thereof," a claimant cannot resort to a suit against state officials to circumvent the manifest congressional purpose to channel all challenges to decisions denying a claim for benefits through Section 405(g). See *Ellis* v. *Blum*, 643 F.2d 68, 76 (2d Cir. 1981).

Certainly the statutory text does not warrant the recognition of such a substantial loophole. State officials act as the Secretary's agents in adjudicating claims for benefits; they perform these functions under standards prescribed by the Secretary (42 U.S.C. (Supp. V) 421(a)), and their expenses are paid by federal funds (42 U.S.C. (& Supp. V) 421(e), 1383b). Compare *Schweiker* v. *McClure*, 456 U.S. 188, 190-191, 196-197 (1982). The Secretary therefore is the real party in interest in any litigation concerning claims for disability benefits; indeed, the regulations governing the States' determinations of disability expressly provide that "[t]he State agency will not be responsible for defending in court any determination made, or any procedure for making determinations, under these regulations" (20 C.F.R. 404.1615(f)). Compare *United States* v. *Erika, Inc.*, 456 U.S. 201, 205-206 n.4 (1982). Accordingly, for purposes of the third sentence of Section 405(h), the responsible state officials stand in the shoes of the federal "officer[s]" and "employee[s]" who are expressly mentioned in that sentence.

Moreover, the second sentence of Section 405(h) provides that "[n]o findings of fact or decision of the Secretary shall be reviewed by any * * * tribunal * * * except as herein provided"—*i.e.*, except as provided in 42 U.S.C. 405(g). Under the statutory scheme, the findings and decisions of the state agency on disability claims are those of the Secretary, and in fact it is SSA, not the state agency, that formally renders the decision to the claimant after it receives and conducts any necessary review of the state agency's proposed disposition. See *Mathews* v. *Eldridge*, 424 U.S. at 338. Section

405(h) therefore applies equally to bar suits under 28 U.S.C. (Supp. V) 1331 against state officials.

CONCLUSION

The Court may wish to hold the petition in this case and dispose of it in light of its decision in *Heckler* v. *Ringer*, No. 82-1772, if that decision sufficiently addresses the issues presented here. In the alternative, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 1984

APPENDIX A

UNITED STATES COURT OF APPEALS, THIRD CIRCUIT

No. 82-1514

FRANK KUEHNER, DOROTHY BURAYAK, RICHARD BURNS, ALICE HETHERINGTON, FRANK JENNINGS, JR., PHILIP FISHER, CLINTON ROYAL, SOLOMON KATZ, RAYMOND STANIEWICZ, JAMES N. MCKEOWN, JAMES LOUGHLIN, MARGARET DOUGLAS, LAWRENCE COOK, STEVEN SVERDLOW, ELAINE FLEIGELMAN AND RIVA YANOVSKAYA, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, JAMES MCKEOWN AND RIVA YANOVSKAYA, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, APPELLANTS,

v.

RICHARD SCHWEIKER, SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, JOHN A. SVAHN, COMMISSIONER, SOCIAL SECURITY ADMINISTRATION, BARRY STERN, SECRETARY, PA. DEPT. OF LABOR & INDUSTRY, JOHN DELPAINE, DIRECTOR, PA. DISABILITY DETERMINATION BUREAU.

Argued June 1, 1983.
Decided Sept. 19, 1983.

OPINION OF THE COURT

Before GIBBONS and BECKER, Circuit Judges, and WEBER, District Judge.*

GIBBONS, Circuit Judge.

*Hon. Gerald J. Weber, United States District Judge for the Western District of Pennsylvania, sitting by designation.

The plaintiffs, former recipients of Social Security disability benefits, appeal from an order dismissing their class action complaint for lack of subject matter jurisdiction. The defendants are Richard Schweiker, Secretary of Health and Human Services, John A. Svahn, Commissioner, Social Security Administration (the federal defendants), Barry Stern, Secretary, Pennsylvania Department of Labor and Industry, and John Delpaine, Director, Pennsylvania Disability Determination Bureau (the state defendants). The defendants administer Titles II and XV of the Social Security Act. 42 U.S.C. § 401 et seq. (Supp. V 1981). The Complaint challenges methods employed by the defendants in determining that disability payments should be terminated. In that process the state defendants participate on behalf of the Social Security Administration, and their actions are subject to review by that Administration. We hold that the trial court, 547 F.Supp. 49, erred in dismissing the complaint for lack of jurisdiction, and we reverse.

I

Each of the sixteen named plaintiffs is a former recipient of disability benefits who has been notified that those benefits have been or are about to be terminated, and each has presented a claim to a state or federal agency for continued benefits. The complaint alleges that, motivated by the goal of reducing disability benefits payments for the fiscal year 1982 and thereafter, the federal defendants adopted policies, implemented by the state defendants, which have resulted in high volume review of continued eligibility. It alleges further that the high volume review process has or will

soon affect over 250,000 class members in Pennsylvania who have previously properly been determined to be eligible for such benefits. It alleges, moreover, that the high volume review process which the defendants have implemented (1) fails to ascertain whether there has been any substantial medical improvement in the disabled person's disabling condition, (2) fails to give any presumptive effect to the prior disability determination, (3) results in cessation of disability benefits despite lack of medical evidence in the record justifying that action, (4) ignores or fails to weigh treating physician evidence, and (5) ignores vocational factors, the effects of combined impairments, and the effects of disabling pain. These defects are alleged to be fixed policies applicable to all disability benefit recipients. The complaint alleges, further, that many of the class members suffer from mental illness or disabilities which make it unlikely that they will appreciate the steps which they may have to take to obtain review of initial termination decisions, that many others will be subject to medical risk by the termination of treatment resulting from termination of medicare benefits, and that most class members rely on their disability payments for the necessities of life. These and similar allegations are relied upon as likely to cause immediate and irreparable harm. The complaint charges that the high volume review process involving the five deficiencies alleged is illegal in several respects. These fixed policies are said to violate the Social Security Act, as interpreted by this court, and to deprive class members of benefits to which they are entitled without due process of law. For purposes of a Rule 12(b)(1) motion we must assume that the factual allegations are true.

For relief the plaintiffs seek a declaratory judgment that defendants are erroneously and illegally terminating or threatening to terminate class members receipt of disability benefits by failing:

a. to determine whether substantial medical improvement has occurred;
b. to allow presumptive effect to prior determinations of disability;
c. to develop fully and to accord appropriate weight to evidence from treating physicians; and
d. to follow a proper sequential disability evaluation process, including consideration of medical evidence, combination of impairments, pain, and residual functional capacity.

Injunctive relief against such illegality is sought as well.

II

The Social Security Administration does not before this court contend that the fixed policies alleged in the complaint are consistent with interpretations of the Social Security Act made by this court and others. Indeed at oral argument the Justice Department attorney appearing for the defendants conceded that the Social Security Administration pursues, with respect to certain rulings by courts of appeals, a policy of nonacquiescence. The Social Security Administration has, for example, adopted such a policy with respect to an April 16, 1981 decision of the United States Court of Appeals for the Ninth Circuit holding that disability benefits could not be terminated unless it showed that there was a material improvement in the claimant's medical condi-

tion. Memorandum of February 23, 1982 From Associate Commissioner Office of Hearings and Appeals to all Components of the Social Security Administration. 43a. The Social Security Administration does contend that by virtue of 42 U.S.C. § 405(h) (1976) the district court lacks subject matter jurisdiction to consider its policies either in a suit against the federal defendants or in a suit against the state defendants. And, implicitly at least, the defendants contend that 42 U.S.C. § 405(g) (1976) controls even with respect to challenges to fixed agency policies which violate due process.

III

The district court held that it lacked subject matter jurisdiction to entertain the complaint against either the state or the federal defendants.

A. The State Defendants

The complaint alleges jurisdiction over the state defendants by virtue of 28 U.S.C. § 1343(a)(3) (Supp. V 1981) because of constitutional violations. The court ruled that because the state defendants were administering a federal program they were acting under color of federal law, and thus that there was no jurisdiction under that statute. The court's observation is arguably correct, but irrelevant. Reading the complaint as charging that state officers, acting under color of federal law, deprived the class members of property interests to which the Social Security Act entitled them, either in violation of the due process clause or in violation of the Social Security Act, states a claim arising under the Constitution or laws of the United States. As the trial court construed the complaint against the state officers, therefore, there was jurisdiction to consider it without

regard to jurisdictional amount. 28 U.S.C. § 1331 (Supp. V 1981). Moreover, *Weinberger v. Salfi*, 422 U.S. 749, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975), holding that 42 U.S.C. § 405(h) eliminates section 1331 jurisdiction over suits against the Social Security Administration to recover on any claim arising under the Social Security Act, is not controlling. Section 405(h) refers only to actions against "the United States, the Secretary, or any officer or employee thereof." It cannot be construed as a limitation of state court jurisdiction over suits against state officers, or as a limitation of the general jurisdictional grant in section 1331 except as specified.

We recognize that the jurisdictional reference in the complaint, while mentioning section 1331, relied specifically on 28 U.S.C. § 1343 (Supp. V 1981) for jurisdiction over the state defendants.[1] However, the complaint, as construed by the district court, alleges claims against state officers arising under the Constitution and laws of the United States, and we are instructed by 28 U.S.C. § 1653 (1976) that "[d]efective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts." The Justice Department is appearing for all defendants, and we can conceive of no prejudice to the state defendants from looking to the allegations of the complaint in order to determine subject matter jurisdiction. *See Ellis v. Blum*, 643 F.2d 68, 75-76 (2d Cir.1981) (Section 1331 provides basis for jurisdiction

[1] Since the elimination of jurisdictional amount in 28 U.S.C. § 1331 the jurisdictional grant in 28 U.S.C. § 1343 appears to have little practical utility.

over state defendants in Social Security Act litigation even though not pleaded).

Thus we hold that the court erred in holding that it lacked subject matter jurisdiction over the suit against the state defendants. Whether the complaint states a claim against them upon which declaratory and injunctive relief may be granted against them in the absence of the federal defendants is a separate question. *Bell v. Hood*, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946). It is not a question we need address on this appeal, however, for as indicated below the federal defendants were properly joined in the district court.

B. The Federal Defendants

For subject matter jurisdiction as to the federal defendants the complaint relied upon 42 U.S.C. §§ 405(g) and 1383(c), on 28 U.S.C. § 1361, and on 28 U.S.C. § 1331. The district court rejected each basis of jurisdiction. We consider them separately.

42 U.S.C. §§ 405(g) and 1383(c)

Section 405(g) provides for jurisdictional review of decisions of the Secretary made after a hearing, in a civil action in a United States District Court. The trial court held that each named plaintiff and each class member must finally exhaust all administrative remedies before a complaint on his behalf for judicial review could be entertained. In so ruling the court failed to take into account this court's decision in *Liberty Alliance of the Blind v. Califano*, 568 F.2d 333 (3d Cir.1977). In that case we held that section 405(g) permitted class actions on behalf of Supplemental Security Income recipients whose benefits have been reduced or terminated. We wrote:

> In order for a district court properly to entertain an action under § 405(g), two conditions must be satisfied. First, a claim for benefits must have been presented to the Secretary. Second, there must have been a final decision after hearing. The Supreme Court has held, however, that only the first condition is a mandatory requirement. The second—the requirement that the claimant exhaust his administrative remedies—can be waived either by the Secretary, *Mathews v. Diaz*, 426 U.S. 67. 76, 96 S.Ct. 1883 [1889] 48 L.Ed.2d 478 (1976), or, under certain circumstances, by the court on its own determination, *Mathews v. Eldridge*, 424 U.S. 319 [96 S.Ct. 893, 47 L.Ed.2d 18] (1976).

568 F.2d at 344. We held that the plaintiffs in *Liberty Alliance* had met the first, nonwaivable condition, because all the claimants were benefit recipients whose benefits had been reduced or terminated. *Id.* That holding is controlling in this case with respect to the first, non-waivable condition, for the plaintiffs and the class they seek to represent are identically situated.

Liberty Alliance also addressed the Social Security Administration's contention that the holding in *Mathews v. Eldridge*, 424 U.S. 319, 328 [96 S.Ct. 893, 899, 47 L.Ed.2d 18] (1976), was limited to challenges to agency action on constitutional grounds. We wrote:

> [*Weinberger v.*] *Salfi* [422 U.S. 749 [95 S.Ct. 2457, 45 L.Ed.2d 522] (1975)] teaches us that if the legal issue is constitutional, since the administrative agency cannot decide that issue, no exhaustion is required. 422 U.S. at 765, 95 S.Ct. 2457.... Where the legal issue is statutory, however, the agency does have authority to decide it, subject of course to judicial review. The test for exhaustion of a statutory issue in an individual case, we believe,

> should be whether the Secretary has taken a final position on that issue. In the class context the test should be no different.

568 F.2d at 345-46. Thus *Liberty Alliance* settles two points. There is no § 405(g) exhaustion requirement for constitutional issues, and for statutory issues the court may waive exhaustion if the Secretary has taken a final position on them.

Here the plaintiffs present both constitutional and statutory issues. Moreover the complaint alleges, and at this stage we must accept the allegation as true, that the challenged policies represent fixed positions of the Social Security Administration. Thus the complaint fails squarely within the *Liberty Alliance* holding.

While the trial court simply ignored *Liberty Alliance*, the Justice Department brief attempts to distinguish it on the ground that with respect to one named plaintiff, Mrs. Carney, the claim had been exhausted at the highest administrative level. Appellee's Brief at 25. The reference, however, to a single exhausted claim, is taken entirely out of context. The *Liberty Alliance* opinion points to the Secretary's decision in Mrs. Carney's case, not as satisfying the exhaustion requirement for the entire class, but as evidence of the fact that the Secretary had taken a final position on the legal issue. Fairly read, the complaint alleges that the Social Security Administration's position on the challenged procedures is final. The government has filed no affidavit to the contrary. The nonacquiescence memorandum of February 23, 1982 referred to above suggests rather strongly that the plaintiffs will be able to prove the allegation. But in any event, for purposes of this Fed.R.Civ.P. 12(b)(1) ruling the allegation in the com-

plaint controls and puts the case squarely within *Liberty Alliance*.

Although the Justice Department brief makes the rather lame attempt to distinguish *Liberty Alliance* referred to above, its real thrust is that the Secretary does not acquiesce in that holding. The Brief urges that *Mathews v. Eldridge* permits judicial waiver of exhaustion only with respect to constitutional issues which are "entirely collateral" to individual claims. Essentially the same argument was rejected by this court in *Liberty Alliance*, and for good reasons. There we noted:

> The sensible construction of § 405(g) in *Salfi*, *Eldridge*, and *Diaz* accommodates the sometimes competing needs of the administrative process for time to arrive at a mature judgment on often complex legal issues, of the judicial process for avoidance of multiple applications for judicial review, and of similarly situated benefit applicants for the avoidance of futile administrative delays in the determination of their benefits.

568 F.2d at 346. Each of the policy considerations adverted to in the quoted passage from *Liberty Alliance* is fully applicable here. Indeed, if the allegations of the instant complaint are proved, the policy arguments in favor of classwide relief are even stronger, for the plaintiffs in effect charge that the Social Security Administration has for budgetary reasons instructed those responsible for termination adjudications to disregard definitive interpretations of the Act made by the courts.

In any event, while the Secretary may feel free to express nonacquiescence in *Liberty Alliance* or any other construction of the Social Security Act announced by

this court, the rules under which we operate do not afford any such leeway.[2] This panel is, and the district court was, bound by *Liberty Alliance* unless the court in banc should choose to overrule it. Since *Liberty Alliance* was followed by *Mattern v. Mathews*, 582 F.2d 248, 249, 252-53 (3d Cir.1978), *cert. denied*, 443 U.S. 912, 99 S.Ct. 3101, 61 L.Ed.2d 876 (1979), and in *Town Court Nursing Center v. Beal*, 586 F.2d 266, 275 (3d Cir.1978) (in banc), an in banc overruling seems unlikely. The fact that other federal courts have followed the *Liberty Alliance* section 405(g) interpretation suggests a broad consensus. *See Wright v. Califano*, 587 F.2d 345, 349 (7th Cir.1978); *Jones v. Califano*, 576 F.2d 12, 19 (2d Cir.1978), *Caswell v. Califano*, 583 F.2d 9, 13 (1st Cir.1978); *Kennedy v. Harris*, 87 F.R.D. 372, 375 (S.D.Cal.1980); *Adams v. Califano*, 474 F.Supp. 974, 982 (D.Md.1979); *Fitzgerald v. Schweiker*, 538 F.Supp. 992, 997-98 (D.Md.1982).

Thus we hold that the trial court erred when it disregarded the controlling *Liberty Alliance* precedent and dismissed the complaint for lack of subject matter jurisdiction.

28 U.S.C. § 1361

In the district court the plaintiffs also asserted jurisdiction under the federal mandamus statute, 28 U.S.C. § 1361 (1976). The trial court, although citing in another context Judge Friendly's opinion in *Ellis v.*

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[2] Judge Weis has commented perceptively upon the costs resulting from the practice of federal agency nonacquiescence in decisions of the courts of appeals. *See Goodman's Furniture Co. v. United States Postal Serv.*, 561 F.2d 462, 465-66 (3d Cir.1977) (Weis, J., concurring).

Blum, 643 F.2d 68 (2d Cir.1981), summarily rejected that basis for jurisdiction. In *Ellis v. Blum*, like this a challenge to an administrative action by the Social Security Administration, Judge Friendly carefully analyzes the scope of district court jurisdiction under 28 U.S.C. § 1361 to afford class-wide relief with respect to defective procedures. He holds that 42 U.S.C. § 405(h) does not affect the district court's jursdiction under section 1361. 643 F.2d at 82. We need not repeat here Judge Friendly's typically thorough and careful analysis. We only note that the *Ellis v. Blum* holding was anticipated in this court by our holding in *Mattern v. Weinberger*, 519 F.2d 150, 156-57 (3d Cir.1975), *vacated and remanded on other grounds, Mathews v. Mattern*, 425 U.S. 987, 96 S.Ct. 2196, 48 L.Ed.2d 812 (1976), that 28 U.S.C. § 1361 affords jurisdiction in a class action challenging the validity of recoupment procedures adopted by the Social Security Administration for the recovery of overpayments.

Thus the trial court erred as well in disregarding the *Mattern v. Weinberger* precedent and refusing to entertain the plaintiff's action under 28 U.S.C. § 1361.

§ 1331

Since we have already identified two separate statutes affording subject matter jurisdiction over plaintiffs' lawsuit against the federal defendants, there is no need to address the question whether, despite 42 U.S.C. § 405(h), 28 U.S.C. § 1331 provides subject matter jurisdiction for declaratory and injunctive relief with respect to procedures as distinguished from collection of benefits. *But see St. Louis University Hospital v. Blue Cross Hospital Services*, 537 F.2d 283, 291-92

(8th Cir.), *cert. denied*, 429 U.S. 977, 97 S.Ct. 484, 50 L.Ed.2d 584 (1976).

IV

Since there was subject matter jurisdiction over the claim against the state defendants under 28 U.S.C. § 1331 and subject matter jurisdiction over the federal defendants both under 42 U.S.C. § 405(g) and under 28 U.S.C. § 1361, the judgment dismissing the complaint for lack of subject matter jurisdiction will be reversed.

EDWARD R. BECKER, Circuit Judge, concurring.

While I agree that there was subject-matter jurisdiction over the federal and state defendants in this case and that the judgment dismissing the complaint for lack of subject-matter jurisdiction must be vacated and the case remanded for further proceedings, I disagree with the majority's approach and reach my conclusion on different grounds. I will consider the issues in the order set forth by the majority.

I. JURISDICTION OVER THE STATE DEFENDANTS

The majority concludes that subject-matter jurisdiction over the state defendants lies under 28 U.S.C. § 1331 (Supp. IV 1980) notwithstanding *Weinberger v. Salfi*, 422 U.S. 749, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975), in which the Supreme Court read 42 U.S.C. § 405(h) (1976)[1] as eliminating section 1331 jurisdiction over suits against the Social Security Administration to recover on any claim arising under the Social Security Act. *Id.* at 756-62, 95 S.Ct. at 2462-65. The majority purports to distinguish *Salfi* by observing that

> [s]ection 405(h) refers only to actions against the United States, the Secretary, or any officer or employee thereof. It cannot be construed as a limitation of state court jurisdiction over suits against state officers, or as a limitation of the general jurisdictional grant in section 1331 except as specified.

Majority op. at Part III.A. Because section 405(h) does not expressly preclude resort to section 1331 in suits

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[1] 42 U.S.C. § 405(h) (1976) provides, in relevant part: "No action against the United States, the Secretary, or any officer or employee thereof shall be sought under section 1331 or 1346 of title 28 to recover on any claim arising under this subchapter."

against state defendants such as the Secretary of the Pennsylvania Department of Labor and Industry and the Director of the Pennsylvania Disability Determination Bureau, the majority concludes that *Salfi* simply "is not controlling," *id.*

I believe that the majority has read the Supreme Court's opinion too narrowly. It is true, of course, that section 405(h) does not expressly bar section 1331 jurisdiction over the state defendants, but the majority glosses over the fact that the state defendants are merely the alter egos of the federal defendants, who clearly fall within the ban of section 405(h). As Judge Friendly observed in *Ellis v. Blum*, 643 F.2d 68, 76 (2d Cir.1981), a case cited by the majority:

> On its face § 405(h)'s ban on actions "against the United States, the Secretary, or any officer or employee thereof" does not apply to a suit against *state* officials. However, a forceful argument can be made that the state officials administering the disability-benefits program are acting under color of federal law as mere agents of the Secretary, and as such are within the ambit of § 405(h). To hold otherwise arguably would invite applicants for Title II benefits to circumvent §§ 405(g) and (h) by bringing suit under § 1331 against the state officials instead of the Secretary, particularly now that the amount-in-controversy requirement of § 1331 has been eliminated as to all defendants.

I agree with this view and therefore conclude that plaintiffs cannot invoke section 1331 to gain jurisdiction over the state defendants.[2] I will address later, *see*

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[2] While the Second Circuit allowed the *Ellis* plaintiff to proceed against the state defendants under § 1331, it did so because of circumstances not present here. The *Ellis* court had

infra Part III, the basis upon which I do find jurisdiction over the state defendants.

II. JURISDICTION OVER THE FEDERAL DEFENDANTS: 42 U.S.C. § 405(g)

The majority concludes that 42 U.S.C. § 405(g) (Supp. V 1981)[3] provides a proper jurisdictional basis for the claims against the federal defendants despite the fact that none of the named plaintiffs, nor any of the class members, exhausted his or her administrative remedies. The majority bases its decision on *Liberty Alliance of the Blind v. Califano*, 568 F.2d 333 (3d

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"little doubt that ... the scope of § 405(h) extends to suits in which claims aganst state officials are merely disguised disputes with the Secretary of the sort described in §§ 405(g) and (h)." 643 F.2d at 76, but found that plaintiff had alleged "separate and distinct" claims against the state defendants and that there thus was "no reason to extend the ban of § 405(h) to preclude § 1331 jurisdiction" over those claims, *id.* These "separate and distinct" claims alleged that the state defendants had violated, in bad faith, the procedures authorized by the Secretary; plaintiff also sought damages against the state defendants to redress her emotional distress. *Id.*

A review of the complaint filed in the case *sub judice* does not reveal an assertion of "separate and distinct" claims against the federal and state defendants. Accordingly, the rationale of *Ellis* does not apply, and § 1331 jurisdiction is not appropriate.

[3] Section 405(g) provides, in relevant part:

> Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow.

In addition, 42 U.S.C. § 1383(c)(3) (1976) provides that "[t]he final determination of the Secretary after a hearing under paragraph (1) [relating to procedures for payment of benefits] shall be subject to judicial review as provided in section 405(g) of this title to the same extent as the Secretary's final determinations under section 405 of this title."

Cir.1977), which the majority considers "controlling ... precedent," Majority op. at Part III.B.1. Indeed, the majority goes so far as to characterize as "lame" the Secretary's attempt to distinguish *Liberty Alliance*. *Id.*

I am far less certain that *Liberty Alliance* controls, for there are two arguable distinctions between that case and the one before us. First, one of the named plaintiffs in *Liberty Alliance* had exhausted her claims at the highest administrative level, thereby complying with section 405(g)'s mandate that district courts review only "final decision[s] of the Secretary made after a hearing to which [plaintiff] was a party." The case *sub judice* presents no exhausted claims. Second, the claim at issue in *Liberty Alliance* related to the way in which benefits were to be calculated[4] and thus was far more collateral to the award or denial of benefits than are the claims now being pursued before this Court.

I concede that *Liberty Alliance* is broadly written; I also note that Judge Gibbons is the author of that opin-

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[4] As we explained the question in *Liberty Alliance*:

> At issue ... is the proper interpretation of § 1611(h) of the Social Security Act Amendment of 1972, Pub.L. No. 92-603, tit. III, § 301, which provides that, in determining the amount of Supplemental Security Income benefits for blind persons, there shall be disregarded the greater of either the amount that could have been disregarded under the former state plan or the amount which would be disregarded under the relevant provisions of the Supplemental Security Income program. [Plaintiffs assert] that in addition to those forms of income specifically directed to be disregarded under the prior Pennsylvania plan, § 1611(h) mandates that the Secretary disregard income which, because of the state plan's assessment of basic, special, and spousal needs, would have been excluded from the computation of benefits under the state plan.

568 F.2d at 335-36. The claim, therefore, was purely mathematical.

ion as well as of the majority opinion here, and I therefore will not quarrel with his judgment that *Liberty Alliance* is apposite. I do not, however, agree that *Liberty Alliance* is itself *dispositive* of the case now before us. Rather, I believe that our finding of subject-matter jurisdiction over the federal defendants under 42 U.S.C. § 405(g) should be grounded on a restatement of the cardinal principles governing this area of the law as those principles may be synthesized from the decisions of the Supreme Court and this Court, including *Liberty Alliance*. I therefore will attempt such a restatement and, in so doing, will highlight my differences with Judge Gibbons over the scope of *Liberty Alliance*. While our differences may be matters of emphasis, I believe that they do have some substantive importance.

The foundation of *Liberty Alliance*, as of other exhaustion cases, is the Supreme Court's opinion in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). *Eldridge* split section 405(g)'s "final decision" requirement into two components,

> only one of which is purely "jurisdictional" in the sense that it cannot be "waived" by the Secretary in a particular case. The waivable element is the requirement that the administrative remedies prescribed by the Secretary be exhausted. The nonwaivable element is the requirement that a claim for benefits shall have been presented to the Secretary. Absent such a claim there can be no "decision" of any type. And some decision by the Secretary is clearly required by the statute.

Id. at 328, 96 S.Ct. at 899. We are not concerned here with the "nonwaivable element" of section 405(g), for the complaint clearly alleges that all class members "have presented claims of continuing disability," Com-

plaint at ¶ 9. We therefore need focus only on that aspect of *Eldridge* that discusses the appropriateness of judicial waiver of the administrative remedies that follow the filing of a claim.

Plaintiff in *Eldridge* was a recipient of Social Security disability benefits; when notified that his benefits were to be terminated, Eldridge did not request reconsideration of the decision but filed suit against the Secretary, claiming that the due-process clause of the fifth amendment to the Constitution requires that a recipient of disability benefits be granted an evidentiary hearing prior to the termination of those benefits.

The Supreme Court ruled against Eldridge on the merits but upheld the taking of jurisdiction, recognizing that "cases may arise where a claimant's interest in having a particular issue resolved promptly is so great that deference to the agency's judgment is inappropriate." 424 U.S. at 330, 96 S.Ct. at 900. The Court deemed Eldridge's suit to be such a case because Eldridge had raised a constitutional, rather than a statutory, claim, and because that claim was "entirely collateral to his substantive claim of entitlement." *Id.* Moreover, the Court recognized the hardship that would befall Eldridge, were it necessary for him to save his contentions for the post-termination administrative-review process. *Id.* at 331-32, 96 S.Ct. at 900-01.

In the course of its opinion, the Court also articulated "the core principle that statutorily created finality requirements should, if possible, be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered," *id.* at 331 n.11, 96 S.Ct. 900 n.11. This principle is especially critical in light of the fact that "[i]t is unrealistic to expect that

the Secretary would consider substantial changes in the current administrative review system at the behest of a single aid recipient raising a constitutional challenge in an adjudicatory context," *id.* at 330, 96 S.Ct at 900. The *Eldridge* approach, therefore, is a pragmatic one, focusing on the nature and collaterality of the asserted claim, including the likelihood that the Secretary would "consider substantial changes in the administrative review system" at the behest of a single claimant, and the harm that would be caused to the would-be plaintiff by relegating him to his administrative remedies.

Less than two years later, this Court decided *Liberty Alliance*, which addressed *Eldridge* and its predecessor, *Weinberger v. Salfi*, *supra*. We there noted the differences between unexhausted constitutional claims (as in *Eldridge*) and unexhausted statutory claims, 568 F.2d at 345-46, and observed:

> *Salfi* teaches us that if the legal issue is constitutional, since the administrative agency cannot decide that issue, no exhaustion is required.... Where the legal issue is statutory, however, the agency does have authority to decide it, subject of course to judicial review. The test for exhaustion of a statutory issue in an individual case, we believe, should be whether the Secretary has taken a final position on that issue. In the class context the case should be no different.

Id. at 346 (citations omitted). The finality of the Secretary's position in *Liberty Alliance* was evidenced by the Department of Health, Education, and Welfare's ("HEW's") conduct during negotiations with plaintiffs and by a letter from HEW stating that the Secretary would not modify his interpretation of the relevant stat-

utory provision except in response to legislative or judicial action. *Id.*[5]

Liberty Alliance and the majority here seem to focus exclusively on the question whether the Secretary has taken a fixed and final position on the asserted claim. As I read *Liberty Alliance*, however, this Court did not—and, indeed, could not—read out of the law the collaterality requirement that played so important a role in the Supreme Court's *Eldridge* opinion. It was unnecessary to dwell on that issue in *Liberty Alliance* because the plaintiffs' claim in that case, involving the calculation of benefits, *see supra* note 4, was clearly collateral to any substantive award or denial of those benefits.

I therefore conclude, after reviewing *Salfi*, *Eldridge*, and *Liberty Alliance*, that there are three basic criteria that must be met before judicial waiver of section 405(g)'s exhaustion requirement becomes appropriate: (1) the unexhausted claim must be at least substantially collateral to the question whether plaintiffs should continue to receive disability benefits; (2) the Secretary must have taken a fixed and final position on the unexhausted claim, thereby rendering exhaustion futile; and (3) requiring exhaustion must impose substantial hardship on, or cause irreparable harm to, the plain-

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[5] We also noted that the Secretary's "firm position has been *confirmed* in this lawsuit, in which one plaintiff . . . has fully exhausted all available administrative review." 568 F.2d at 346 (emphasis added). The majority thus may well be correct in its assertion that exhaustion by one plaintiff in *Liberty Alliance* was only "evidence of the fact that the Secretary has taken a final position on the legal issue," rather than a prerequisite for satisfying the exhaustion requirement in a class action, Majority op. at Part III.B.1.

tiffs.[6] It is only because I believe that each of these three criteria has been satisfied that I concur in the majority's waiver of the exhaustion requirement.

A. Collaterality

The defendants have argued that collaterality is absent here because plaintiffs' claims are inextricably intertwined with the merits of each disability-benefits termination decision.[7] It is impossible, defendants ar-

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[6] In propounding these three criteria, I have relied on the discussions in *Salfi*, *Eldridge*, and *Liberty Alliance* of statutory, rather than constitutional, claims. I read the claims set forth in plaintiffs' complaint as primarily statutory; I have significant doubts about their constitutional validity. However, by concluding that plaintiffs need not exhaust their statutory claims, I decide, a *fortiori*, that they need not exhaust their constitutional ones, which, according to *Liberty Alliance*, are subject to a lesser exhaustion standard, 568 F.2d at 346.

[7] As the Second Circuit recently said in *Smith v. Schweiker*, 709 F.2d 777, 780-81 (2d Cir. 1983):

> Exhaustion ... would frame the issue in a much clearer fashion than is possible when it is posed as an abstraction. While the legal issue raised by plaintiffs may seem well-defined to them, it seems rather unformulated to us. What is meant by evidence of medical improvement, for example, is somewhat ambiguous. If disability status has been previously determined on the grounds of paralysis from the neck down, a video tape of the claimant playing football might well seem sufficient evidence to terminate benefits. Yet plaintiffs seem at times to be arguing that unless the claimant's health has improved, i.e. the paralysis has disappeared rather than having been initially misdiagnosed, a termination of benefits is unlawful however conclusive the evidence of no present disability. At other times they seem to require medical testimony as essential to termination. It is also not clear why, if the initial disability determination was based on a finding of a lack of suitable jobs in the economy, evidence of medical improvement is necessary where a different finding as to the availability of such jobs based on new evidence is made. We note this, not to comment on the merits, but to suggest

gue, to isolate questions relating to the medical-improvement standard, testimony of treating physicians, and "sequential" evaluation from the medical and vocational history of each applicant. Moreover, imposition of a medical-improvement standard might even dictate the outcome of some cases.[8]

These are forceful arguments, but the fact remains that, should plaintiffs prevail on each of their claims in this case, the Secretary still will be at liberty to terminate all payments upon finding the recipients no longer disabled. The district court thus would not be ruling on the merits of the underlying claims for benefits but only on the *procedures* by which such determinations ultimately will be made by the state and federal agencies. I therefore believe that plaintiffs' claims are substantially collateral to the question whether plaintiff should continue to receive disability benefits.

B. Final Position and Futility of Exhaustion

I also believe that the Secretary has taken a fixed and final position on the questions raised by plaintiffs; judicial waiver of exhaustion requirements thus will not cause "premature interference with agency processes" or deny the agency the chance to "function efficiently," *Weinberger v. Salfi*, *supra*, 422 U.S. at 765, 95 S.Ct. at 2457. SSA Ruling 81-6 (1981), for example, sets out the

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that the claim raised by plaintiffs may seem far stronger, and certainly more clearly framed, when urged in the context of a concrete case, developed in the review process, with a factual record setting out the reasons for the prior ruling and subsequent termination, than when posed in the abstract.

[8] *But cf. infra* note 14 (discussing *Kuzmin v. Schweiker*, 714 F.2d 1233 (3d Cir.1983), and what evidence a claimant must present in a disability-benefits termination proceeding).

standards to be used in continuing-disability investigations and expressly rejects plaintiffs' medical-improvements claim: "It will not be necessary to determine whether or how much the individual's condition has medically improved since the prior favorable determination." App. at A42. *See also* Defendant's Response to Request for Admissions—First Set, App. at A59 ("Admit that there is no distinction in the standards of evaluating a claim on initial application or continuing disability review"; "finding of improvement in a claimant's condition is not required under the Secretary's regulations"). And the statement of defendant Barry H. Stern (Secretary of Pennsylvania's Department of Labor and Industry) to the United States Senate's Finance Committee on August 18, 1982, reveals that the Secretary also has taken a fixed position on plaintiffs' sequential-evaluation claim. Mr. Stern testified:

> SSA [Social Security Administration] now discourages the allowance of claims where an impairment is similar in severity, but not specifically described in the medical listing.
>
> Compounding this issue is that SSA no longer considers the combined effect of all impairments of the individual, but rather evaluates each impairment singularly, resulting in many of the multiply disabled being terminated from the disability rolls.

App. at A50. These and other indications of the Secretary's views constitute strong evidence that SSA has taken a fixed and final position on the claims at issue and that it therefore would be "unrealistic to expect that the Secretary would consider substantial changes in the current administrative review system at the be-

hest of a single aid recipient...." *Mathews v. Eldridge*, *supra*, 424 U.S. at 330, 96 S.Ct. at 900.

Notwithstanding this evidence, however, and in deference to the policies of judicial noninterference and avoidance of premature review that underlie the exhaustion requirement, I would be reluctant to find a fixed and final position on the part of the Secretary if I were convinced that the Secretary would yield to a court decision following full administrative review. Therefore, what really clinches this case for me is the Secretary's posture toward judicial declarations that displease SSA. In *Finnegan v. Matthews*, 641 F.2d 1340 (9th Cir.1981), the Court of Appeals for the Ninth Circuit held that payments to certain recipients of disability benefits could not be terminated absent proof of material medical improvement or of commission of clear and specific error during the prior determination. Following this ruling, Louis B. Hays, Associate Commissioner of SSA's Office of Hearings and Appeals, sent a memorandum to, *inter alia*, all administrative law judges:

> I want to draw your attention to Social Security Ruling SSR 82-10c in the January 1982 quarterly Rulings publication, indicating [SSA's] non-acquiescence in the Court's decision. Under SSA policy, it is not necessary to show that there has been improvement in the claimant's condition or any error in the prior State determination for benefits to be ceased....
>
> ....
>
> Social Security Ruling SSR 82-10c is binding on all components of SSA including administrative law judges and the Appeals Council (20 C.F.R. 422.408). SSA's policy must be followed in cases in-

> volving the issue of cessation of disability, including cases involving claimants who reside within the jurisdiction of the United States Court of Appeals for the Ninth Circuit.

Memorandum from Louis B. Hays to All RCALJs, ALJICs, and ALJs (Feb. 23, 1982), App. at A43.[9] It thus appears that, when the Secretary has taken a final position on a disputed question, he will continue to adhere to, and require compliance with, those views even after a Court of Appeals has resolved the issue against him. Under these circumstances, exhaustion of administrative remedies becomes a mere exercise in futility, both for the claimants and for the courts. It makes far more sense to allow the claimants to litigate the case and, if successful, to obtain a decree enforceable via contempt proceedings.

C. Substantial Hardship and Irreparable Harm

I further conclude that it would cause great hardship, and possibly irreparable harm, to require plaintiffs to exhaust all levels of administrative review before filing this suit in the courts. What we said in *Liberty Alliance* still holds: "the plaintiffs here are largely dependent upon public assistance.... An erroneous termination or substantial reduction of this assistance would severely burden their subsistence. Requiring each plaintiff fully to exhaust his administrative remedies, especially where, as here, such exhaustion would be futile, would increase this burden." 568 F.2d at 345; *accord Mattern v. Mathews*, 582 F.2d 248, 253 (3d

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[9] Judge Weis had aptly commented upon a similar government litigation policy in *Goodman's Furniture v. United States Postal Serv.*, 561 F.2d 462 (3rd Cir.1977) (Weis, J., concurring).

Cir.1978), *cert. denied* 443 U.S. 912, 99 S.Ct. 3101, 61 L.Ed.2d 876 (1979). I also cannot help but note the time, effort, and anxiety involved in pursuing a claim through the administrative levels.[10]

Accordingly, I concur in the majority's judgment that jurisdiction under section 405(g) lies with respect to the federal defendants. It does not appear, however, that that provision may be invoked to assert jurisdiction over the state defendants. I therefore must consider whether any other jurisdictional basis exists with respect to those individuals.

III. MANDAMUS JURISDICTION: 28 U.S.C. § 1361

Plaintiffs also rely on 28 U.S.C. § 1361 (1976)[11] as an additional basis for jurisdiction over the federal defend-

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[10] Defendants seek to answer the irreparable-harm argument by focusing on recent amendments to the Social Security Act granting terminated claimants the option of continuing benefits until an administrative law judge reviews the state agency's determination. Pub.L. No. 97-455, 96 Stat. 2497 (1983). If the ALJ affirms the termination, the continued benefits will be considered overpayments subject to recoupment at the discretion of the Secretary.

The new law, however, does not significantly relieve the hardship to plaintiffs, for it expires in June 1984 and applies only to termination decisions made by state agencies between January 12, 1984, and October 1983. *See Rivera v. Heckler*, 568 F.Supp. 235 (D.N.J.1983). It therefore does not apply to plaintiffs, at least some of whom already had had their benefits terminated by the time this suit was filed in 1982, before the effective date of Pub.L. No. 97-455. Moreover, the new law does nothing to relieve the nonfinancial burdens imposed on these disabled plaintiffs.

[11] Section 1361 provides: "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

ants, and the majority agrees, citing "the controlling *Mattern v. Weinberger* [519 F.2d 150, 156-57 (3d Cir.1975)] precedent" in support of that position, Majority op. at Part III.B.2. I note at the outset that the judgment in *Mattern* was vacated by the Supreme Court and the case remanded for further consideration in light of *Mathews v. Eldridge*, *supra*. *Mathews v. Mattern*, 425 U.S. 987, 96 S.Ct. 2196, 48 L.Ed.2d 812 (1976). When we reheard the case, we reserved the question whether mandamus jurisdiction lies in an action involving Social Security procedures. *Mattern v. Mathews*, *supra*, 582 F.2d at 253 ("Like the district court below, . . . we do not need to reach the question of mandamus jurisdiction."). Although we observed that "it is far from clear that section [405(h)] bars mandamus jurisdiction in this case," *id.*, it seems apparent to me that any further consideration of the availability of section 1361 jurisdiction must be *de novo*.

Because I agree with the majority that jurisdiction as to the federal defendants lies under section 405(g), I reach the section 1361 question only to decide whether jurisdiction lies over the state defendants.[12] I first will

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[12] I recognize that the complaint alleged § 1361 as a basis for jurisdiction only over the federal, and not the state, defendants. However, "our freedom to predicate jurisdiction on theories not pleaded below," *Ellis v. Blum*, *supra*, 643 F.2d at 75; *accord Mumford v. Glover*, 503 F.2d 878, 882-83 (5th Cir.1974); *Albert v. Chafee*, 465 F.2d 367, 368 (9th Cir.1972) (per curiam); 1 J. Moore, *Moore's Federal Practice* ¶ 0.60[3] at 623 n.5 (2d ed. 1982); *see Frederick L. v. Thomas*, 578 F.2d 513, 516 & n.6 (3d Cir.1978) (taking appellate jurisdiction under 28 U.S.C. § 1651 though appellant had pled jurisdiction only under 28 U.S.C. § 1291), convinces me that, at least in this case, plaintiffs' failure to rely on § 1361 as to the state defendants does not bar my considering that provision as a jurisdictional basis.

discuss whether section 1361 jurisdiction is available at all in cases that fall within section 405(g); I then will turn to the question whether this is an appropriate case in which to assert mandamus jurisdiction.

A. Availability of Mandamus Jurisdiction

The major obstacle to the availability, in theoretical terms, of jurisdiction under section 1361 is section 405(h), which might appear to channel *all* suits involving SSA procedures through section 405(g). As we have seen, section 405(h) bars resort to section 1331, *see Weinberger v. Salfi*, *supra;* it also precludes invocation of section 10 of the Administrative Procedure Act, *see Califano v. Sanders*, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977). However, the Supreme Court has thrice reserved the question whether section 405(h) preempts mandamus jurisdiction, *see Califano v. Yamasaki*, 442 U.S. 682, 697-98, 99 S.Ct. 2545, 2555-56, 61 L.Ed.2d 176 (1979); *Norton v. Mathews*, 427 U.S. 524, 529-30, 96 S.Ct. 2771, 2774-75, 49 L.Ed.2d 672 (1976); *Mathews v. Eldridge*, *supra*, 424 U.S. at 332 n.12, 96 S.Ct. at 901 n.12, and this Court has not previously taken a position on this question, *see Mattern v. Mathews*, *supra*, 582 F.2d at 253.

The Court of Appeals for the Second Circuit, however, has addressed the issue and has held that section 405(h) does not override mandamus jurisdiction. *See Ellis v. Blum*, *supra*, 643 F.2d at 78-82.[13] In a compre-

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[13] I do not read the Second Circuit's opinion in *Smith v. Schweiker*, *supra* note 7, as retreating substantially from the position announced in *Ellis*. *Smith* held that "[m]andamus jurisdiction does not lie where the claims are not against the Secretary for failure to comply but rather are directed at the propriety of the regulations themselves," 709 F.2d at 779; this holding

hensive and scholarly opinion, Judge Friendly analyzed the legislative history of the relevant statutes and concluded that Congress never manifested an intention to preclude assertion of section 1361 jurisdiction in SSA cases. The Court of Appeals for the Ninth Circuit has reached a similar conclusion, holding that "language prohibiting reliance on the federal question or mandamus provisions for any action "to recover on a claim arising under the [Social Security] Act only applie[s] to actual claims for benefits." *Ringer v. Schweiker*, 697 F.2d 1291, 1293 (9th Cir.1982) (quoting section 405(h)) *cert. granted Heckler v. Ringer*, ___ U.S. ___, 103 S.Ct. 3535, 77 L.Ed.2d 1386 (1983); *accord Ryan v. Shea*, 525 F.2d 268, 271-72 (10th Cir.1975).

As does the majority, I agree with the reasoning of *Ellis* v. *Blum* and see no need to repeat Judge Friendly's careful analysis. I therefore concur in the majority's conclusion that, at least in some cases, section 1361 jurisdiction is available to review SSA procedures.

As I noted above, I reach the mandamus question only in order to decide whether jurisdiction exists over the state defendants. Section 1361, by its terms, applies only to "officer[s] or employee[s] of the United States or any agency thereof" and thus might be read as not covering state officials such as the defendants in this case. These state defendants, however, are essentially the alter egos of their SSA counterparts and effectively are officers, employees, or agents of an agency of the United States.[14] Thus just as I would not allow section

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would seem to imply that section 1361 *may* be used in some cases. I also note that *Smith* did not even cite the 1981 *Ellis* decision and, at any rate, presumably cannot overrule it.

[14] Plaintiffs therefore cannot proceed against the state de-

1331 to be used to gain jurisdiction over these individuals, *see supra* Part I, I conclude, on the facts of this case, that the state defendants fall within the ambit of section 1361. *Cf. Chaudoin v. Atkinson*, 494 F.2d 1323, 1329 (3d Cir.1974) (finding section 1361 jurisdiction over Adjutant General of Delaware National Guard because "Adjutant General of Delaware is an agency *or an agent* of the United States and therefore within the purview of § 1361") (emphasis added).

The next question, then, is whether this is an appropriate case for the assertion of mandamus jurisdiction.

B. Appropriateness of Mandamus Jurisdiction

Precisely why it believes mandamus jurisdiction to be appropriate in this case is something that the majority does not explain. I therefore will set forth the reasons why I believe that plaintiffs should be permitted to proceed against the state defendants under section 1361.

I begin with the proposition that courts traditionally have been reluctant to assert mandamus jurisdiction for the same reason that they generally have required exhaustion of administrative remedies: the desire to avoid premature judicial review and to minimize interference with the functioning of a coordinate branch of government. *Cf. Ellis v. Blum, supra*, 643 F.2d at 81 (allowing assertion of section 1361 jurisdiction only be-

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fendants under 28 U.S.C. § 1343(a)(3) (Supp. IV 1980), for the state defendants, in performing the roles delegated to them by federal statute, are not acting under color of state law; moreover, the Social Security Act is not legislation securing "equal rights" within the meaning of § 1343(3), *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 620-23, 99 S.Ct. 1905, 1917-18, 60 L.Ed.2d 508 (1979). *Accord Smith v. Schweiker, supra* note 7, 709 F.2d at 780.

cause it would result in a "minimum of interference" with SSA's judgment). Thus, we have held that mandamus is an appropriate remedy "only where a clear duty is owed the plaintiff or there is an abuse of discretion," *Grant v. Hogan*, 505 F.2d 1220, 1225 (3d Cir.1974); *accord Donovan v. United States*, 580 F.2d 1203, 1208 (3d Cir.1978). But when section 405(g) jurisdiction lies even in the absence of exhaustion of administrative remedies, as it does in this case, *see supra* Part II, I believe that the presence of those factors prompting judicial waiver of exhaustion requirements also insures that assertion of mandamus jurisdiction will not unduly threaten the prerogatives of the concerned agency.

As I discussed above, a court may waive section 405(g)'s exhaustion requirements only when (1) the claims presented to the court are substantially collateral to a substantive determination by the Secretary on the question whether to continue or terminate payment of disability benefits; (2) the Secretary has taken a fixed and final position on the litigated issues; and (3) the plaintiffs would suffer substantial hardship or irreparable harm if required to exhaust administrative remedies. Because I conclude that the issues presented by plaintiffs are in fact substantially collateral to plaintiffs' claims for benefits and that defendants have taken a fixed and final position on those issues, I do not see our assumption of jurisdiction under section 405(g) or section 1361 as interfering impermissibly with the operations of SSA or its affiliated state agencies. In short, I see little practical difference in a case such as this between the two jurisdictional bases, as both are informed by the same policy considerations.

It is true, as I noted above, that our mandamus cases appear to require the existence of a "clear right" owed by the defendant agency or official to the plaintiff. The existence *vel non* of such a clear right to relief, however, would seem to go to the merits of the claim and relate to whether or not a writ of mandamus should issue. On remand, therefore, the district court will have to determine whether plaintiffs have a clear right to the relief they seek. I note, however, that our recent decision in *Kuzmin v. Schweiker*, *supra*, would appear to provide a solid basis for plaintiffs' claims relating to the medical-improvement standard and the presumption of continuing disability.[15]

Accordingly, I conclude that, because plaintiffs have satisfied the criteria of *Mathews v. Eldridge*, *supra*, and *Liberty Alliance of the Blind v. Califano*, *supra*, they may proceed by means of section 1361 jurisdiction[16] against the state defendants.[17]

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[15] We held in *Kuzmin* that, "once the claimant [in a disability-benefits termination proceeding] has introduced evidence that his or her condition remains essentially the same as it was at the time of the earlier determination [of disability], the claimant is entitled to the benefit of a presumption that his or her condition remains disabling." *Kuzmin v. Schweiker*, *supra*, at 1237.

[16] *But cf. Smith v. Schweiker*, *supra* note 7, 709 F.2d at 779 (holding that mandamus jurisdiction does not lie in case involving an unexhausted medical-improvement claim).

[17] Even if my conclusion as to mandamus jurisdiction over the state defendants is incorrect, there would appear to be still another basis for jurisdiction over those individuals: pendent-party jurisdiction. The state defendants, as I have said before, *see supra* Parts I and IIIA, are the alter egos of the federal defendants, and it would seem wasteful to prevent plaintiffs from including them in the proceedings.

Because plaintiffs allege basically identical claims against the state and federal defendants, and because the state defendants

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appear here only as agents of SSA, the concerns expressed in *Aldinger v. Howard*, 427 U.S. 1, 96 S.Ct. 2413, 49 L.Ed.2d 276 (1976), which involved separate state-law claims brought against the defendant that plaintiff sought to add as a pendent party, do not seem to apply here and thus do not bar an assertion of jurisdiction. I also note that *Aldinger* purported to decide

> only the issue of so-called "pendent party" jurisdiction with respect to a claim brought under §§ 1343(3) and 1983. Other statutory grants and other alignments of parties and claims might call for a different result. When the grant of jurisdiction to a federal court is exclusive, for example, as in the prosecution of tort claims against the United States under 28 U.S.C. § 1346, the argument of judicial economy and convenience can be coupled with the additional argument that *only* in a federal court may all of the claims be tried together. As we indicated at the outset of this opinion, the question of pendent-party jurisdiction is "subtle and complex," and we believe that it would be as unwise as it would be unnecessary to lay down any sweeping pronouncement upon the existence or exercise of such jurisdiction.

Id. at 18, 96 S.Ct at 2422 (footnote omitted). Jurisdiction over the claims against the federal defendants, at least, would seem to be allowable only under 42 U.S.C. § 405(g) or 28 U.S.C. § 1361; thus, unlike those in *Aldinger*, the claims are exclusively within the province of the federal courts. Pendent-party jurisdiction therefore is more appropriate here than it was in that case. *Cf. Stewart v. United States*, 716 F.2d 755, 757-759 (10th Cir.1982) (allowing pendent-party jurisdiction in Federal Tort Claims Act suit over driver of Government vehicle who was employed by private operator of Government-owned nuclear-weapons facility).

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 82-1514

FRANK KUEHNER, DOROTHY BURAYAK, RICHARD BURNS, ALICE HETHERINGTON, FRANK JENNINGS, JR., PHILIP FISHER, CLINTON ROYAL, SOLOMON KATZ, RAYMOND STANIEWICZ, JAMES N. MCKEOWN, JAMES LOUGHLIN, MARGARET DOUGLAS, LAWRENCE COOK, STEVEN SVERDLOW, ELAINE FLEIGELMAN AND RIVA YANOVSKAYA, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, JAMES MCKEOWN AND RIVA YANOVSKAYA, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, APPELLANTS

v.

RICHARD SCHWEIKER, SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, JOHN A. SVAHN, COMMISSIONER, SOCIAL SECURITY ADMINISTRATION, BARRY STERN, SECRETARY, PA. DEPT. OF LABOR AND INDUSTRY, JOHN DELPAINE, DIRECTOR, PA. DISABILITY DETERMINATION BUREAU

~~(D.C. Civil No. 82-1839)~~

**ON APPEAL
FROM THE UNITED STATES
DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

(D.C. Civil No. 82-1839)

JUDGMENT

Present: GIBBONS, and BECKER, *Circuit Judges* and WEBER, *District Judge**

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel June 1, 1983.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered August 2, 1982, be, and the same is hereby reversed.

ATTEST

/s/ Sally Mvros
SALLY MVROS
Clerk

SEPTEMBER 19, 1983

*Honorable Gerald J. Weber, United States District Judge for the Western District of Pennsylvania, sitting by designation.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 82-1514

FRANK KUEHNER, DOROTHY BURAYAK, RICHARD BURNS, ALICE HETHERINGTON, FRANK JENNINGS, JR., PHILIP FISHER, CLINTON ROYAL, SOLOMON KATZ, RAYMOND STANIEWICZ, JAMES N. MCKEOWN, JAMES LOUGHLIN, MARGARET DOUGLAS, LAWRENCE COOK, STEVEN SVERDLOW, ELAINE FLEIGELMAN AND RIVA YANOVSKAYA, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, JAMES MCKEOWAN AND RIVA YANOVSKAYA, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, APPELLANTS

v.

MARGARET M. HECKLER, SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, JOHN A. SVAHN, COMMISSIONER, SOCIAL SECURITY ADMINISTRATION, BARRY STERN, SECRETARY, PA. DEPT. OF LABOR AND INDUSTRY, JOHN DELPAINE, DIRECTOR, PA. DISABILITY DETERMINATION BUREAU

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges*, WEBER, *District Judge**

*Hon. Gerald J. Weber, United States District Judge for the

The petition for rehearing filed by appellee in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judge Garth would grant the petition for rehearing particularly in light of *Heckler v. Lopez*, 104 S. Ct. 10 (1983), No. A-145, granting application for stay in *Lopez v. Heckler*, 713 F.2d 1432 (9th Cir. 1983).

By the Court,

/s/ John J. Gibbons
JOHN J. GIBBONS
Judge

Dated: NOVEMBER 28, 1983

Western District of Pennsylvania, on panel rehearing only.

APPENDIX D

UNITED STATES DISTRICT COURT, E. D. PENNSYLVANIA.

C.A. No. 82-1839.

FRANK KUEHNER, ET AL.

v.

RICHARD S. SCHWEIKER, ET AL.

JULY 30, 1982.

MEMORANDUM OPINION AND ORDER

WEINER, District Judge.

This action involves issues concerning review of disability cases to ascertain whether the recipients are currently disabled as defined by law. The plaintiffs bring this action on behalf of a class of all Pennsylvania Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI) Disability beneficiaries whose benefits have been terminated or are threatened with termination. The plaintiffs challenge the standards employed in conducting these reviews and claim that they are violative of the Social Security Act and the Due Process guarantees of the Constitution. Their claims rest on the following four grounds by which defendants have allegedly erroneously and illegally terminated or threatened to terminate plaintiffs and their class members from receipt of SSDI or SSI benefits by failing:

(a) to determine whether substantial medical improvement has occurred;
(b) to allow presumptive effect to prior determination of disability;

(c) to develop fully and to accord appropriate weight to evidence from treating medical personnel; and

(d) to follow a proper sequential disability evaluation process, including consideration of medical equivalence, combination of impairments, pain, and residual functional capacity.

On these grounds, plaintiffs seek a declaration that the standards applied and procedures followed in determining that the terminations of benefits are erroneous and illegal, and seek an injunction barring defendants from terminating benefits in such cases. The defendants move for an order of dismissal of the action for lack of subject matter jurisdiction. We grant defendants' motion and direct plaintiffs to pursue their available and adequate administrative remedies.

The plaintiffs assert that this court has jurisdiction to hear their claims under 42 U.S.C. 405(g). This section provides for judicial review of a final decision of the Secretary made after a hearing by commencement of a civil action within sixty days after notice of the decision. *Weinberger v. Salfi*, 422 U.S. 749, 763, 95 S.Ct. 2457, 2465, 45 L.Ed.2d 522 (1975). The requirement that there shall have been a decision of the Secretary which was "final" and "made after a hearing" was found to be central to the grant of subject matter jurisdiction by a court. *Id.* at 764, 95 S.Ct. at 2466. This administrative exhaustion requirement assures that the agency functions efficiently and has an opportunity to correct its own errors, as well as affords the parties and courts the benefit of its experience and expertise and its com-

pilation of a record which is adequate for judicial review. *Id.* at 765, 95 S.Ct. at 2466.

The initial determination of what constitutes a "final" decision is left to the Secretary, as is the determination of when full exhaustion of internal review procedures is not necessary to meet the requirement of a "final" decision under 405(g). As the Supreme Court stated in *Weinberger v. Salfi, supra*, at 765-767, 95 S.Ct. at 2466-2467, where the Secretary has satisfied himself that the claim is neither otherwise invalid nor otherwise cognizable under another statutory provision and that the only issue is constitutional, he may voluntarily waive the exhaustion prerequisite. This determination is left to the Secretary since ultimate responsibility for the integrity of the administrative program is his. In the case *sub judice*, plaintiffs' claims are both factual and legal, disputing findings of fact and applications of statutory and regulatory law. The Secretary has determined that these claims should be pursued according to the administrative process and that a record should be compiled according to such process. Upon a finding that plaintiffs' claims are valid, the Secretary would then confer the relief plaintiffs sought—that they are entitled to continue to receive disability benefits. If the Secretary were to find that the claims were invalid, then the court and parties would have a fully compiled record for adequate review. For these reasons, the Secretary refuses to waive the statutory requirement of exhaustion of remedies.

Neither is this an instance in which the exhaustion requirement would be appropriately waived by the court. Such judicial waiver has occurred in the past where the action involved a constitutional challenge

which was collateral to the substantive claim of entitlement. *Mathews v. Eldridge*, 424 U.S. 319, 330, 96, S.Ct. 893, 900, 47 L.Ed.2d 18 (1975). The judicial waiver has not been allowed where the action is directed towards upsetting the determination of the Secretary on the merits, as it is clearly not collateral to the substantive claim and exhaustion is required under 405(g). *Humana of South Carolina, Inc. v. Califano*, 590 F.2d 1070 (D.C.Cir. 1978). This is equally so where the challenge is a constitutional one to statutory provisions limiting the availability of benefits and where the challenge is on the merits to limitations on benefits imposed by regulations. *Id; Rhode Island Hospital v. Califano*, 585 F.2d 1153 (1st Cir. 1978). In the recent case of *Humana*, the Court of Appeals for the District of Columbia Circuit refused to consider statutory and constitutional contentions challenging regulations limiting reimbursement. The court held that the statutory and constitutional claims consisted of a grievance respecting the amount of reimbursement due and was "unmistakably directed at upsetting on the merits the Secretary's determination." Therefore, the grievance must first be submitted for any administrative processing available under the Act's procedures. *Id.*, at 1079. *Accord*, *Rhode Island Hospital v. Califano*, *supra*, at 1158-1159. The *Humana* court further held that the district court, refusing to order the requested retroactive corrective adjustments, but instead directing an administrative redetermination of the acceptable level of remedies, could not alter the essential character and objective of the suit nor the need for prior resort to the administrative process. *Humana of South Carolina, Inc., v. Califano*, *supra*, at 1080. The case *sub judice* is

similar in that plaintiff's claims consist of a grievance respecting the benefits due, namely that plaintiffs should continue to receive benefits, and is directed at upsetting the merits of the Secretary's determination. Their constitutional claims are inextricably intertwined with these grievances. They are not collateral. Such claims should be submitted for any administrative processing available under the Social Security Act.

Because the exhaustion requirement is "something more than simply a codification of the judicially developed doctrine of exhaustion which cannot be disposed of by merely a judicial conclusion of futility," *Weinberger v. Salfi*, *supra* at 766, it cannot be excused by a claim that the administrative process is unlikely to be resolved in favor of plaintiffs. Neither can it be disposed of by a claim of delayed review. *Bob Jones University v. Simon*, 416 U.S. 725, 747, 94 S.Ct. 2038, 2051, 40 L.Ed.2d 496 (1974). Both of these conditions, even if present, do not persuade this court to waive the exhaustion requirement in the case *sub judice*.

For the court to circumvent the exhaustion requirement and review plaintiffs' individual claims would impose an impossible burden of proof upon the Secretary. To disprove such a claim, the Secretary would be required to prove that the evaluative procedures were followed in each individual case without the benefit of a full administrative record and background on claimants typically developed when the administrative process runs it full course. For the court to circumvent the process and review *en masse* plaintiffs' claims without regard to the specific facts of each individual's case, contradicts the statute's demand that "disability claims be evaluated on a case-by-case method, taking into ac-

count each applicant's peculiar characteristics." *Santise v. Schweiker*, 676 F.2d 925, 930 (3d Cir. 1982).

Such dangerous and unwarranted results further support the requirements of 405(g) and the proposition that a judicial review of the Secretary's actions is exclusive and cannot be circumvented by resort to the general jurisdiction of the district courts. Surely, the language of 405(g) does not suggest that Congress in 1939 thought it was establishing procedures to be used in class actions challenging the constitutionality of the provisions of the Act or of procedures adopted by the Secretary, and seeking broad injunctive and declaratory relief. *Ellis v. Blum*, 643 F.2d 68, 74 (2d Cir. 1981).

Alternatively, plaintiffs assert that this court has a jurisdictional basis under the mandamus statute, 28 U.S.C. § 1361. However, this section provides mandamus jurisdiction only where there are "extraordinary circumstances." *Kerr v. United States District Court*, 426 U.S. 394, 402-403, 96 S.Ct. 2119, 2123-2124, 48 L.Ed.2d 725 (1976); *State Board of Education v. Fox*, 620 F.2d 578, 579 (6th Cir. 1980). The party seeking such jurisdiction must have "no other adequate means to attain the relief he desires." *Kerr v. United States District Court*, *supra* at 403. *See also*, *Kennecott Copper Corp.*, *Nevada Mines v. Costle*, 572 F.2d 1349, 1356 (9th Cir. 1978); *Haneke v. Secretary of HEW*, 535 F.2d 1291, 1296 n. 15 (D.C.Cir.1976); 1 *Moore's Federal Practice*, ¶ 0.62[17], at 700.51. In the case *sub judice*, plaintiffs have not satisfied the criteria for the extraordinary remedy of mandamus. The plaintiffs have other ample and available means by which to have their claims reviewed, such as the administrative procedures of an Administrative Law Judge hearing and an Ap-

peals Council review, and such as judicial review pursuant to 405(g) with the benefit of an administrative record.

The plaintiffs' assertion of jurisdiction under 28 U.S.C. § 1343 over State defendants must also fail. Section 1343 requires that persons have acted "under color of any state law, statute, ordinance, regulation, custom or usage," for jurisdiction to be established. The State defendants administering the disability benefits program have acted under color of federal law as mere agents of the Secretary and have not acted under color of any State law or statute in the case *sub judice*. *Ellis v. Blum*, *supra* at 74.

Lastly, the assertion of pendent jurisdiction must fail. The doctrine of pendant jurisdiction is applicable only where there is a federal claim and a state claim. *United Mine Workers v. Gibbs*, 383 U.S. 715, 725-726, 86 S.Ct. 1130, 1138-1139, 16 L.Ed.2d 218 (1966). As previously stated, there is neither a federal nor state claim in the case *sub judice* at this time.

APPENDIX E

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. 28 U.S.C. (Supp. V) 1331 provides:

Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

2. 28 U.S.C. 1361 provides:

Action to compel an officer of the United States to perform his duty

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

3. Section 205(b), (g) and (h) of the Social Security Act, as codified at 42 U.S.C. (& Supp. V) 405(b), (g) and (h) provide:

Evidence, procedure and certification for payments

* * * * *

(b) Administrative determination of entitlement to benefits statement; findings of fact; hearings; investigations

The Secretary is directed to make findings of fact, and decisions as to the rights of any individual applying for a payment under this subchapter. Any such decision by the Secretary which involves a determination of disability and which is in whole or in part unfavorable to such individual shall contain a statement of the case, in understandable language, setting forth a discussion of the evidence, and

stating the Secretary's determination and the reason or reasons upon which it is based. Upon request by any such individual or upon request by a wife, divorced wife, widow, surviving divorced wife, surviving divorced mother, husband, widower, child, or parent who makes a showing in writing that his or her rights may be prejudiced by any decision the Secretary has rendered, he shall give such applicant and such other individual reasonable notice and opportunity for a hearing with respect to such decision, and, if a hearing is held, shall, on the basis of evidence adduced at the hearing, affirm, modify, or reverse his findings of fact and such decision. Any such request with respect to such a decision must be filed within sixty days after notice of such decision is received by the individual making such request. The Secretary is further authorized, on his own motion, to hold such hearings and to conduct such investigations and other proceedings as he may deem necessary or proper for the administration of this subchapter. In the course of any hearing, investigation, or other proceeding, he may administer oaths and affirmations, examine witnesses, and receive evidence. Evidence may be received at any hearing before the Secretary even though inadmissible under rules of evidence applicable to court procedure.

* * * * *

(g) Judicial review

Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United

States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court may, on motion of the Secretary made for good cause shown before he files his answer, remand the case to the Secretary for further action by the Secretary, and it may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or its decision, or both, and shall file with the

court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.

(h) Finality of Secretary's decision

The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under sections 1331 or 1346 of title 28 to recover on any claim arising under this subchapter.

4. Sections 221(a), (c), (d) and (h) of the Social Security Act, as codified at 42 U.S.C. (Supp. V) 421(a), (c), (d) and (h), provide:

Disability determinations

(a) State agencies

(1) In the case of any individual, the determination of whether or not he is under a disability (as defined in section 416(i) or 423(d) of this title) and of the day such disability began, and the determination of the day on which such disability ceases, shall be made by a State agency, notwithstanding

any other provision of law, in any State that notifies the Secretary in writing that it wishes to make such disability determinations commencing with such month as the Secretary and the State agree upon, but only if (A) the Secretary has not found, under subsection(b)(1) of this section, that the State agency has substantially failed to make disability determinations in accordance with the applicable provisions of this section or rules issued thereunder, and (B) the State has not notified the Secretary, under subsection (b)(2) of this section, that it does not wish to make such determinations. If the Secretary once makes the finding described in clause (A) of the preceding sentence, or the State gives the notice referred to in clause (B) of such sentence, the Secretary may thereafter determine whether (and, if so, beginning with which month and under what conditions) the State may again make disability determinations under this paragraph.

(2) The disability determinations described in paragraph (1) made by a State agency shall be made in accordance with the pertinent provisions of this subchapter and the standards and criteria contained in regulations or other written guidelines of the Secretary pertaining to matters such as disability determinations, the class or classes of individuals with respect to which a State may make disability determinations (if it does not wish to do so with respect to all individuals in the State), and the conditions under which it may choose not to make all such determinations. In addition, the Secretary shall promulgate regulations specifying, in such detail as he deems appropriate, performance standards and administrative requirements and procedures to be followed in performing the disability determination function in order to assure ef-

fective and uniform administration of the disability insurance program throughout the United States. The regulations may, for example, specify matters such as—

(A) the administrative structure and the relationship between various units of the State agency responsible for disability determinations,

(B) the physical location of and relationship among agency staff units, and other individuals or organizations performing tasks for the State agency, and standards for the availability to applicants and beneficiaries of facilities for making disability determinations,

(C) State agency performance criteria, including the rate of accuracy of decisions, the time periods within which determinations must be made, the procedures for and the scope of review by the Secretary, and, as he finds appropriate, by the State, of its performance in individual cases and in classes of cases, and rules governing access of appropriate Federal officials to State offices and to State records relating to its administration of the disability determination function,

(D) fiscal control procedures that the State agency may be required to adopt, and

(E) the submission of reports and other data, in such form and at such time as the Secretary may require, concerning the State agency's activities relating to the disability determination.

Nothing in this section shall be construed to authorize the Secretary to take any action except pursuant to law or to regulations promulgated pursuant to law.

* * * * *

(c) Review of determination by Secretary

(1) The Secretary may on his own motion or as required under paragraphs (2) and (3) review a de-

termination, made by a State agency under this section, that an individual is or is not under a disability (as defined in section 416(i) or 423(d) of this title) and, as a result of such review, may modify such agency's determination and determine that such individual either is or is not under a disability (as so defined) or that such individual's disability began on a day earlier or later than that determined by such agency, or that such disability ceased on a day earlier or later than that determined by such agency. A review by the Secretary on his own motion of a State agency determination under this paragraph may be made before or after any action is taken to implement such determination.

(2) The Secretary (in accordance with paragraph (3)) shall review determinations, made by State agencies pursuant to this section, that individuals are under disabilities (as defined in section 416(i) or 423(d) of this title). Any review by the Secretary of a State agency determination under this paragraph shall be made before any action is taken to implement such determinaton.

(3) In carrying out the provisions of paragraph (2) with respect to the review of determinations, made by State agencies pursuant to this section, that individuals are under disabilities (as defined in section 416(i) or 423(d) of this title), the Secretary shall review—

(A) at least 15 percent of all such determinations made by State agencies in the fiscal year 1981,

(B) at least 35 percent of all such determinations made by State agencies in the fiscal year 1982, and

(C) at least 65 percent of all such determinations made by State agencies in any fiscal year after the fiscal year 1982.

(d) Hearings and judicial review

Any individual dissatisfied with any determination under subsection (a), (b), (c), or (g) of this section shall be entitled to a hearing thereon by the Secretary to the same extent as is provided in section 405(b) of this title with respect to decisions of the Secretary, and to judicial review of the Secretary's final decision after such hearing as is provided in section 405(g) of this title.

* * * * *

(h) Periodic reviews of eligibility

In any case where an individual is or has been determined to be under a disability, the case shall be reviewed by the applicable State agency or the Secretary (as may be appropriate), for purposes of continuing eligibility, at least once every 3 years; except that where a finding has been made that such disability is permanent, such reviews shall be made at such times as the Secretary determines to be appropriate. Reviews of cases under the preceding sentence shall be in addition to, and shall not be considered as a substitute for, any other reviews which are required or provided for under or in the administration of this subchapter.

5. Section 1631(c) of the Social Security Act, as codified at 42 U.S.C. (& Supp. V) 42 U.S.C. 1383(c), provides:

Procedure for payment of benefits

* * * * *

(c) Hearing to determine eligibility or amount of benefits; time within which to request

hearing; time for determinations of Secretary pursuant to hearing; judicial review

(1) The Secretary is directed to make findings of fact, and decisions as to the rights of any individual applying for payment under this subchapter. Any such decision by the Secretary which involves a determination of disability and which is in whole or in part unfavorable to such individual shall contain a statement of the case, in understandable language, setting forth a discussion of the evidence, and stating the Secretary's determination and the reason or reasons upon which it is based. The Secretary shall provide reasonable notice and opportunity for a hearing to any individual who is or claims to be an eligible individual or eligible spouse and is in disagreement with any determination under this subchapter with respect to eligibility of such individual for benefits, or the amount of such individual's benefits, if such individual requests a hearing on the matter in disagreement within sixty days after notice of such determination is received, and, if a hearing is held, shall, on the basis of evidence adduced at the hearing affirm, modify, or reverse his findings of fact and such decision. The Secretary is further authorized, on his own motion, to hold such hearings and to conduct such investigations and other proceedings as he may deem necessary or proper for the administration of this subchapter. In the course of any hearing, investigation, or other proceeding, he may administer oaths and affirmations, examine witnesses, and receive evidence. Evidence may be received at any hearing before the Secretary even though inadmissible under the rules of evidence applicable to court procedure.

(2) Determination on the basis of such hearing, except to the extent that the matter in disagreement involves a disability (within the meaning of

section 1382c(a)(3) of this title), shall be made within ninety days after the individual requests the hearing as provided in paragraph (1).

(3) The final determination of the Secretary after a hearing under paragraph (1) shall be subject to judicial review as provided in section 405(g) of this title to the same extent as the Secretary's final determinations under section 405 of this title.

* * * * *

6. 20 C.F.R. 416.903, governing the Supplemental Security Income Program, provides:

Who makes disability and blindness determinations.

(a) *State agencies.* State agencies make disability and blindness determinations for the Secretary for most persons living in the State. State agencies make these disability and blindness determinations under regulations containing performance standards and other administrative requirements relating to the disability and blindness determination function. States have the option of turning the function over to the Federal Government if they no longer want to make disability determinations. Also, the Secretary may take the function away from any State which has substantially failed to make disability and blindness determinations in accordance with these regulations. Subpart J of this part contains the rules the States must follow in making disability and blindness determinations.

(b) *Social Security Administration.* The Social Security Administration will make disability and blindness determinations for the Secretary for—

(1) Any person living in a State which is not making for the Secretary any disability and blindness determinations or which is not making those

determinations for the class of claimants to which that person belongs; and

(2) Any person living outside the United States.

(c) *What determinations are authorized.* The Secretary has authorized the State agencies and the Social Security Administration to make determinations about—

(1) Whether you are disabled or blind;

(2) The date your disability or blindness began; and

(3) The date your disability or blindness stopped.

(d) *Review of State Agency determinations.* On review of a State agency determination or redetermination of disability or blindness we may find that—

(1) You are, or are not, disabled or blind, regardless of what the State agency found;

(2) Your disability or blindness began earlier or later than the date found by the State agency; and

(3) Your disability or blindness stopped earlier or later than the date found by the State agency.